Supreme Court, U.S.
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No. 92-78

In The

Supreme Court of the United States

October Term, 1992

SULLIVAN COUNTY, TENNESSEE;
MIKE GARDNER, LYNN HAWKINS,

Petitioners,

v.

JOHN DOE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY TO POINTS RAISED IN RESPONDENT'S BRIEF IN OPPOSITION

The plaintiff/respondent's Brief in Opposition[1] seeks to reargue his miscellaneous "jail conditions" claims which were dismissed by the District Court. The Sixth Circuit Court of Appeals affirmed that the plaintiff's county jail "systemic deficiencies" claims were irrelevant to the legal issues material to his 42 *U.S.C. § 1983* case and to his claim he was attacked with a toothbrush during his incarceration [App. 5 - 7][2].

The plaintiff's reliance on the colorful and conflicting testimony of various former jail inmates is also irrelevant to the critical legal issues raised in the Petition for Writ of Certiorari. There is no proof in the record that the Sullivan County or its jail policy-makers, Sheriff Gardner or Captain Lynn Hawkins, had knowledge of any of the alleged incidents described by the various disgruntled former jail inmates who testified for the plaintiff. The inmate witnesses could not testify that they had told any particular jailer of the alleged events which they described at the trial of the case.

The plaintiff has referred to the testimony of one of his witnesses, El Rasheed Hogg Muhammad, formerly known as Antonio White, in support of his contention that the Sullivan County Jail was a violent place and therefore this Honorable Court should not grant a writ of certiorari. While the defendants insist the testimony of

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[1] As in the Petition for Writ of Certiorari, the respondent John Doe will be referred to as "plaintiff." The petitioners will be referred to as "defendants."

[2] References to "App." are to the pages of the appendix bound and filed with the Petition for Writ of Certiorari.

former jail inmates has no bearing on the significant legal issues involved in the Sixth Circuit's opinion or in the Petition for Writ of Certiorari, the defendants refer to that portion of Muhammad's testimony which contradicts the claim made by the plaintiff in his Brief in Opposition that cellblock #3 was the center of "pervasive" inmate violence:

> Q. All right. What was cell block 3 in Sullivan County like in September of '86 other than what you've already told us about it being dirty?
>
> A. Excuse me. Just a routine daily, just lay around, read books, play cards, whatever.
>
> Q. Were there fights in cell 3?
>
> A. No.
>
> [Muhammad, Tr. 121, direct examination]
>
> * * *
>
> Q. Now, what about Tracy's hair, did you ever observe anything concerning Tyronne Ross or Kenny Copas or other inmates Tracy's hair?
>
> A. Yes, I did.
>
> Q. What did you see happen to Tracy's hair?
>
> A. I seen him get a Mohawk hair cut?
>
> Q. Was that at his request?
>
> A. At Tracy's request.
>
> Q. At Tracy's request.
>
> A. At Tracy's request.
>
> [Muhammad, Tr. 127, 128, direct examination]
>
> * * *

Q. I apologize. Mr. Muhammad, was there a time at the Sullivan County Jail when you saw Tyronne Ross do anything with his male sex organ?

A. Other than shaking it and pointing it at various individuals, that's about it.

Q. So you're saying you did see that?

A. Yeah.

Q. And was one of the individuals that he shook and pointed his sex organ at Tracy?

A. Yes, it was.

Q. And did you tell anybody about that?

A. No, because it really wasn't nothing out of the ordinary.

[Muhammad, Tr. 130, direct examination]

* * *

Q. Approximately how many other individuals were in cell block 3?

A. I'd say eleven at one time.[3]

Q. Now, Ms. White has asked you about the general conditions of the jail. How many of

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[3] Each of the county jail's twelve-men cellblocks was fitted with three sleeping areas or "slams," each with four bunk beds and a toilet and separated from each other by iron bars. The "slams," arranged in a row against a concrete wall, each opened into a larger "day area" containing benches, tables, and shower facilities. Each cellblock was separated from the other similarly constructed cellblocks on either side by a concrete wall. Jailers could observe the day area and "slams" through the bars which formed the wall on one end of the cellblock. The opposite wall held a locked steel door which opened into the jail's hallway and allowed guards and inmates to enter or leave the cellblock's day area.

the cell blocks were you a prisoner in during this time of incarceration in '86 and early '87?

A. I stayed in cell 3 the entire time.

Q. And how did cell block 3 get along? Were there fights in cell block 3?

A. No.

Q. Were there any sexual assaults in cell block 3?

A. None to my knowledge.

Q. Were you ever sexually assaulted?

A. No.

Q. When you made reference to the welcoming committee that you discussed here with Ms. White, you stated that you saw that Tracy here was no major threat to anyone in the cell block, is that correct?

A. That's correct.

Q. Was there any individual in that cell block that posed a threat to the other inmates?

A. No, Sir. We would have got rid of him.

Q. How would you characterized cell block 3 as compared with the other cell blocks in the jail, was it a quiet cell block, was it a noisy cell block?

A. Very quiet. Everyone got along together. You didn't have to worry about hiding your money or anything like that.

Q. Now, you mentioned that you had a weapon in the – in your slam area. Did you hide that from the guards when they came in and searched?

A. When they ever did come in.

Q. What kind of weapon was it?

A. It was a knife.

Q. Did you ever use it on anybody?

A. No, Sir, I never had.

Q. Did anybody use a weapon on anybody else in cell block 3 while you were there?

A. No, Sir.

[Muhammad, Tr. 132-134, cross-examination]

Despite the plaintiff's claims of "misclassification" of cellblock #3 inmates, Tyronne Ross, the inmate who stuck a toothbrush partially into the plaintiff's anus on one occasion, was not incarcerated for any crime of sexual violence.[4] None of the Tennessee Corrections Institute reports referred to by the plaintiff mentioned any problem with inmate violence at the jail. The earlier class action "jail conditions" case in which the plaintiff's trial attorney, Ms. Penny White, represented inmates seeking to improve the living conditions at the county jail during 1984-1986, and in which Gordon Kampka, the plaintiff's expert witness also testified, did not involve any allegations or findings of pervasive inmate violence. Tyronne

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[4] The plaintiff prefers to categorize the incident a "rape." The evidence showed that there had been only one reported rape in the jail's cellblocks in the eight or so years preceding the plaintiff's assault and there had been no rapes at all during Captain Lynn Hawkins' tenure as jail administrator. There was certainly no contemporaneous pattern of perverted sexual activity in the jail to put the defendant policy-makers on notice that any particular jail inmate was in imminent danger of being molested.

Ross', mischaracterized probation revocation reports which were relied upon by the plaintiff at trial were not part of the jail records and were never seen by the defendants during the plaintiff's incarceration. But the plaintiff's rehashing of evidence which was introduced in his case in chief against all of the various defendants and in support of his "systemic deficiencies" theories misses the point of the Petition for Writ of Certiorari.

When the District Court concluded that the individual defendant jailers had no reason to suspect that the plaintiff was in danger of being assaulted and directed verdicts in their favor [App. 44], and when the Sixth Circuit confirmed the directed verdicts [App. 7 - 9], the defendants, as county jail policy-makers, should have been legally absolved of any liability for the plaintiff's 42 *U.S.C. § 1983* claims. By refusing to require the District Court to enter a judgment notwithstanding the verdict, now a judgment as a matter of law, in favor of Sullivan County and its defendant Sheriff and defendant jail captain, the Sixth Circuit became the first and only circuit court of appeals to refuse to follow the mandate of *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). If the relevant evidence, including the colorful but contradictory accounts of cellblock life given by former inmates, was not sufficient to put the individual defendant jailers on notice that the plaintiff was in danger of being assaulted, sexually or otherwise, then, as a matter of law, the defendant policy-makers could not be found to have been deliberately indifferent to an unconstitutional situation or to have promulgated any policy or custom which violated the plaintiff's Eighth Amendment rights. The Court of Appeals' reference to the "good faith immunity defense" which was never mentioned by the District Court as a

reason for granting the jailers' motions for directed verdicts, is a feigned distinction utilized to avoid the application of *Heller*.

The plaintiff is less than candid in his discussion at Section II and III of his "Reasons for Denying the Petition for a Writ of Certiorari." The defendants did object to the District Court's Fourteenth Amendment charge and did offer an alternative charge which paralleled the deliberate indifference requirements of their proffered Eighth Amendment charge. The plaintiff's claims for relief as embodied in the District Court's final pretrial order [App. 38 - 39] did not include a procedural due process claim and the plaintiff did not request a procedural due process jury instruction. The District Court directed that all proffered, but unaccepted, jury charges be considered as objections to the Court's charge [Tr. 901-905]. In discussion with counsel, the Court expressly rejected the defendants' proposed Fourteenth Amendment charge.

Even though the plaintiff did not submit a Fourteenth Amendment procedural due process charge, the Court gave an instruction which the Sixth Circuit Court of Appeals held was a procedural due process charge. The Court of Appeals found the District Court's procedural due process charge had been "confusing," reversed the judgment in favor of the plaintiff, and directed the District Court to formulate a procedural due process jury instruction within specific parameters now objected to by the defendants in their Petition for Writ of Certiorari.

The defendants insist that the Sixth Circuit's interpretation of procedural due process is in direct conflict with the decisions of this Court previously cited at pages

7 and 8 of their Petition for Writ of Certiorari. Those areas of conflict with established precedent sprang into existence when the Sixth Circuit published its opinion in this case and could only be criticized thereafter. If the Court of Appeals' decision approving the creation of various liberty interests by local government operational manuals were to remain the law, a proliferation of inconsistent, unnecessary, and unmanageable Fourteenth Amendment liberty interest claims will explode in the circuits. The Sixth Circuit's initiation and approval of the practice of allowing federal court juries to second guess jail booking officers' decisions regarding inmate classification for cellblock assignment purposes under any theory of procedural due process is similarly unacceptable and unworkable. A court, not a jury, should decide what type of procedural due process hearing the Fourteenth Amendment requires in any particular situation. The Sixth Circuit's opinion is an unacceptable liberalization and expansion of the liberty interest and procedural due process components of the Fourteenth Amendment.

The defendants' clear position, in the District Court and before the Sixth Circuit, has always been that the Eighth Amendment controls the disposition of the plaintiff's *§ 1983* claims for damages he allegedly sustained as a result of the toothbrush incident during his incarceration in cellblock #3 [Tr. 900-902]. Fourteenth Amendment procedural due process considerations should be either non-existent or irrelevant to the plaintiff's claims.

Contrary to the plaintiff's response in Section III, p. 13, of his brief, the defendants' are not arguing the inadmissability of evidence. This case was initially tried on various 42 *U.S.C. § 1983* theories under which the District Court allowed every type of evidence available to the

plaintiff to be put into the record. At the close of the plaintiff's proof, the Court dismissed the plaintiff's "jail conditions" case and directed verdicts in favor of numerous defendants, including the individual jailers who had exercised the daily "hands-on" custody of the plaintiff. The County, the sheriff, and the jail captain objected to the court's jury instructions regarding the plaintiff's Eighth Amendment claims against them and did bring these objections to the attention of the Sixth Circuit Court of Appeals. The appellate court recharacterized the defendants' objections when it referred to them in its opinion at App. 20. All of the defendants' references to the evidentiary record on the Eighth Amendment issues are intended to emphasize the error in the jury instructions and to highlight the importance of the lower courts' complying with the mandate of *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) which requires the dismissal of the plaintiff's Eighth Amendment claims against the defendant policy-makers when the individual deputies who had direct control and custody of the plaintiff did not violate his Eighth Amendment rights.

The plaintiff's insistence at page 14 of his opposition brief that the physical appearance of the plaintiff was critical to the defendants' liability as policy-makers only emphasizes the significance of the lower courts' departure from *Heller, supra*. As the defendants emphasized in their appellants' brief to the Sixth Circuit – the defendant policy-makers did not personally know the plaintiff and never saw him. The jailers who did see the plaintiff every day and who allegedly should have been aware of the plaintiff's "obvious" disability were expressly found not to have been aware of any circumstances which should

have caused them to believe that the plaintiff was in danger of being assaulted in cellblock #3 [App. 44].

The facts relevant to a determination of the important legal issues involved in the defendants' petition for a writ of certiorari are not in dispute.

CONCLUSION

The Writ of Certiorari to the Sixth Circuit Court of Appeals prayed for by the defendants Sullivan County, Sheriff Mike Gardner, and Captain Lynn Hawkins should be granted.

Respectfully submitted,

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